In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 343

HARRY T. MALTBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner, a former employee of the Fish and Wildlife Service of the Department of Agriculture, seeks review of an order of the Court of Claims dismissing his action for additional salary and wages for overtime, holiday and night work. This work was allegedly performed from January 1, 1955, to September 30, 1956. Petitioner filed a claim with the General Accounting Office on January 20, 1965, and filed his petition in the Court of Claims on June 13, 1965. Petitioner subsequently amended his petition

in the Court of Claims to allege that the Government had actively misled him into believing that he had ten years in which to file his claim; the earliest misrepresentation alleged was contained in a letter dated April 24, 1964 (par. VII(7) of the Court of Claims petition, as amended).

The Court of Claims granted the government's motion to dismiss on the basis of 28 U.S.C. 2501. That provision bars "[e]very claim of which the Court of Claims has jurisdiction * * * unless the petition thereon is filed, within six years after such claim first accrues."

2. The decision below is clearly correct. The ten-year limitation urged by petitioner, found in 31 U.S.C. 71a(1), is by its terms applicable only to claims filed with the General Accounting Office.[1] There is neither reason nor authority for substituting this limitation for the six-year limitation found in 28 U.S.C. 2501, which specifically applies to every claim within the jurisdiction of the Court of Claims. There is, of course, no bar to the consideration of a claim by the General Accounting Office after it has been time-barred in the courts. *Marr* v. *United States*, 106 F. Supp. 204 (Ct. Cl.), certiorari denied, 345 U.S. 956.

Petitioner alternatively claims that, if Section 2501 is applicable, misrepresentations by the govern-

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[1] "Every claim or demand * * * against the United States cognizable by the General Accounting Office * * * shall be forever barred unless such claim * * * shall be received in said office within ten full years after the date such claim first accrued * * *."

ment tolled the running of limitations. However, none of the misrepresentations are alleged to have occurred within six years of September 30, 1956, the end of the period in which the work in question was performed. Therefore, petitioner's estoppel or waiver theories are inapplicable, since the statute had already run when the statements were supposedly made. Furthermore, it is well settled that the government may not be estopped by the representations of its employees. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380. And, since the limitation period affects the jurisdiction of the Court of Claims, it may not be waived. *Munro* v. *United States*, 303 U.S. 36, 41; *Finn* v. *United States*, 123 U.S. 227, 233.

Petitioner also apparently contends that an administrative proceeding is a prerequisite to a suit in the Court of Claims, so that his cause of action did not accrue until the final determination by the General Accounting Office. Cf. *Crown Coat Front Co.* v. *United States*, 386 U.S. 503. However, the filing of a claim with the General Accounting Office has never been considered a prerequisite to a judicial action against the government. *St. Louis, B. & M. Ry.* v. *United States*, 268 U.S. 169, 173; *Burich* v. *United States*, 366 F. 2d 984, 986-987 (Ct. Cl.), pending on petition for certiorari, No. 257 Misc., O.T. 1967; *Iran National Airlines Corp.* v. *United States*, 360 F. 2d 640, 642 (Ct. Cl.); *Withers* v. *United States*, 69 Ct. Cl. 584, 587-88. The requirement of 28 U.S.C. 2501 that "an officer of the United States" settle his ac-

count with the General Accounting Office refers to appointees under Article II, Section 2, of the United States Constitution (compare *United States* v. *Germaine*, 99 U.S. 508) and petitioner does not claim to be such an officer.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1967.

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